IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BERTHA A. BEESLY and :

RANDALL K. BEESLY, : C.A. No. K13C-12-001 WLW

Plaintiffs, :

V.

ALEXANDER P. MILLER, : Defendant/Third-Party Plaintiff, :

v. :

THE CITY OF DOVER, a :

municipal corporation, :

Third-Party Defendant. :

Submitted: March 7, 2014 Decided: April 3, 2014

ORDER

Upon Third-Party Defendant's Motion to Dismiss. *Granted.*

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for Plaintiffs.

Tracy L. Warga, Esquire of Weber Gallagher Simpson Stapleton Fires & Newby, LLP, Dover, Delaware; attorney for Defendant/Third-Party Plaintiff.

Daniel A. Griffith, Esquire and Chad J. Toms, Esquire of Whiteford Taylor & Preston, LLC, Wilmington, Delaware; attorney for Third-Party Defendant.

WITHAM, R.J.

The issue before the Court is whether the Third-Party Defendant is entitled to dismissal of the Third-Party Complaint on grounds of immunity under the Delaware County and Municipal Tort Claims Act.

BACKGROUND

The following facts are taken from the allegations in the Complaint and Third-Party Complaint.

Plaintiffs Bertha A. Beesly (hereinafter "Bertha") and Randall K. Beesly (collectively "Plaintiffs") have filed a negligence claim against Defendant/Third-Party Plaintiff Alexander P. Miller (hereinafter "Miller"). Plaintiffs allege that on December 14, 2011 Bertha was walking in a crosswalk on South State Street in Dover when Miller struck Bertha with his vehicle. Bertha seeks recovery from Miller for various injuries she allegedly suffered as a result of the accident. Bertha's husband has filed a loss of consortium claim against Miller as well.

Miller denies he was negligent and has raised a variety of defenses to Plaintiffs' complaint. Miller has also filed a Third-Party Complaint asserting a contribution claim against the City of Dover (hereinafter "the City"). Miller asserts that it was dark outside when Bertha was using the crosswalk, and that the City was negligent "by failing to install, operate, repair, or otherwise maintain its lighting equipment, specifically the street light at the pedestrian crosswalk on South State Street. . .sufficiently to provide adequate lighting for pedestrians to safely cross [the street]." The street light in question is attached to an electrical utility pole. Miller seeks contribution from the City if Miller is found to be liable for Plaintiffs' damages.

On February 17, 2014, the City filed the instant motion to dismiss the third-party complaint. The City claims immunity under the Delaware County and Municipal Tort Claims Act (hereinafter "the Act"). The City contends that any

decision regarding the nature and adequacy of street lighting is a discretionary function entitled to immunity under the Act. The City further argues that the equipment exception of $10 \, Del. \, C. \, \S \, 4012(1)$ does not apply merely because the street light on South State Street was affixed to an electrical pole. The City, citing to several decisions of the Delaware Supreme Court, urges this Court to narrowly construe the equipment exception and find that it does not apply in the instant case.

Miller argues that the utility pole would fall within the equipment exception. Miller contends that it follows that, because the street light is attached to the pole and because there is "electrical power constantly flowing to it" through the electrical power lines, the street light also falls within the scope of the equipment exception.

STANDARD OF REVIEW

A motion to dismiss a third-party complaint is subject to the same standard that applies to motions to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6).¹ Where, as here, the third-party complaint incorporates by reference the allegations of the original complaint, "the Court must accept as true the well-pleaded allegations in both the underlying complaint and the third-party complaint." The test for sufficiency is a broad one: the claim will survive the motion to dismiss when the third-party plaintiff "may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." A claim will not be dismissed unless "it is clearly without merit, which may be either a matter

 $^{^{1}}$ See Wilson v. Active Crane Rentals, Inc., 2003 WL 22290069, at *2 (Del. Super. Aug. 11, 2003).

² Marcucilli v. Boardwalk Builders, Inc., 1999 WL 1568612, at *3 (Del. Super. Dec. 22, 1999) (citing Precision Air, Inc. v. Standard Chlorine of Delaware, 654 A.2d 403, 406 (Del. 1995)).

³ See Spence v. Funk, 396 A.2d 967, 968 (Del. 1978) (citing Klein v. Sunbeam Corp., 94 A.2d 385 (Del. 1952)).

DISCUSSION

Section 4011 of the Act provides in pertinent part:

- (b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:...
- (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.
- (4) The decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.⁵

Delaware Courts have interpreted the language of § 4011(b) to broadly grant immunity to "discretionary governmental functions involv[ing] policy decisions under the police power," as well as errors committed during the government's exercise of the police power.⁶ In *Sack v. New Castle County*, this Court held that "[p]runing trees or controlling weeds is a discretionary duty." The Court went on to explain: "If the County were negligent in not sufficiently performing either [pruning trees or controlling weeds], it would be immune as a performance of a discretionary

⁴ Wilson, 2003 WL 22290069, at *2 (citing Wilmington Trust Co. v. Politzer & Haney, Inc., 2003 WL 1989703, at *2 (Del. Super. Apr. 25, 2003)).

⁵ 10 *Del. C.* § 4011(b)(3)-(4).

⁶ Sadler v. New Castle Cnty., 565 A.2d 917, 921 (Del. 1989).

⁷ Sack v. New Castle Cnty., 1991 WL 53397, at *3 (Del. Super. 1991)

duty....In this instance, the same reasoning would apply to...insufficient lighting."8

Section 4012 provides several exceptions to immunity under the Act, including the equipment exception:

A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:

(1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.⁹

The Supreme Court has cautioned against a literal interpretation of the term "equipment" in favor of a more restrictive approach, because a broad application of the exception "may seriously erode the Act's general grant of immunity and result in the exception swallowing the rule."¹⁰

In *Porter v. Delmarva Power & Light Company*, the plaintiff was injured when he climbed a utility pole and came into contact with high voltage transmission wires.¹¹ The Superior Court held that the electric utility pole and transmission lines constituted equipment under § 4012(1), and thus the government defendant was not entitled to immunity under the Act.¹² In the subsequent case of *Sadler v. New Castle County*, the Supreme Court explained that "the equipment exception is. . .limited to

⁸ *Id*.

⁹ 10 Del. C. § 4012(1).

¹⁰ Triple C Railcar Serv., Inc. v. City of Wilmington, 630 A.2d 629, 631 (Del. 1993) (citing Sadler, 565 A.2d at 922-23).

¹¹ Porter v. Delmarva Power & Light Co., 488 A.2d 899, 901 (Del. Super. 1984).

¹² *Id.* at 906.

those items of unusual design or size, such as motor vehicles, aircraft or electric transmission lines, which in their normal use or application pose a particular hazard to members of the public.¹³ *Sadler* further held that the legislature did not intend for the term "equipment" to "include items of incidental use which, in themselves, present no such risk."¹⁴

Miller relies on *Porter* for the argument that because the street light is affixed to a utility pole with electrical power from the transmission lines flowing into it, the streetlight constitutes equipment under § 4012(1) and allows for liability on the part of the City. Miller's reliance on *Porter* is misplaced. *Porter* preceded the Supreme Court's decision in *Sadler* that explicitly limited the equipment exception to items of unusual design or size that pose a particular hazard to the public through their normal use. Further, *Porter* was not a case involving allegations of insufficient lighting; rather, the plaintiff in *Porter* was electrocuted by the transmission lines on the utility pole—the very kind of harm *Sadler* found to fall within the equipment exception.

Miller is not claiming he was electrocuted by the streetlight; rather, Miller merely argues that the insufficient illumination allegedly created by the streetlight was the proximate cause of Plaintiffs' damages. Miller provides no authority for his implicit argument that the streetlight somehow takes on the hazardous nature of the utility pole simply by being affixed to it, and the Court declines to accept that proposition. This Court finds that the streetlight is more accurately categorized as an item of incidental use which, by itself, presents no particular hazard to the public. Stated differently, under the Supreme Court's decision in *Sadler*, it is not merely the

¹³ Sadler, 565 A.2d at 923.

¹⁴ *Id*.

kind of equipment that triggers the exception of §4012(1); it is the type of *harm* suffered by the plaintiff as a result of that equipment that allows for government liability. Thus, the Court declines extending the equipment exception to streetlights that are alleged to have caused an accident as a result of insufficient lighting.

The Court further finds that the alleged negligence in question—the City's failure to provide adequate lighting for the crosswalk—fits squarely within the *Sack* decision and constitutes the performance of a discretionary function. Thus, because no exception to immunity applies, the City is immune under the Act, regardless of whether or not the City provided sufficient lighting at the crosswalk.

CONCLUSION

For the foregoing reasons, the City's motion to dismiss Miller's third-party complaint is **GRANTED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh